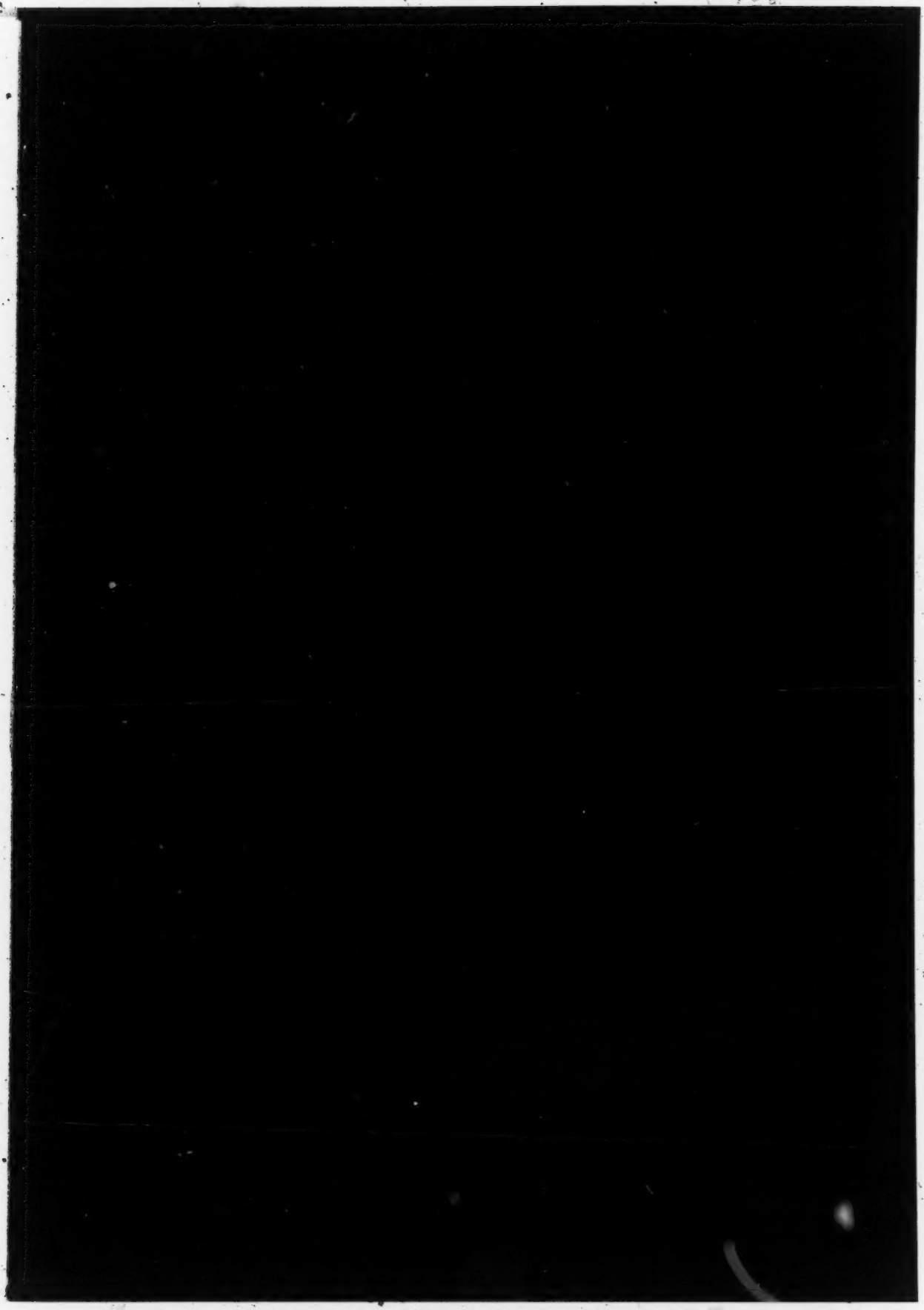

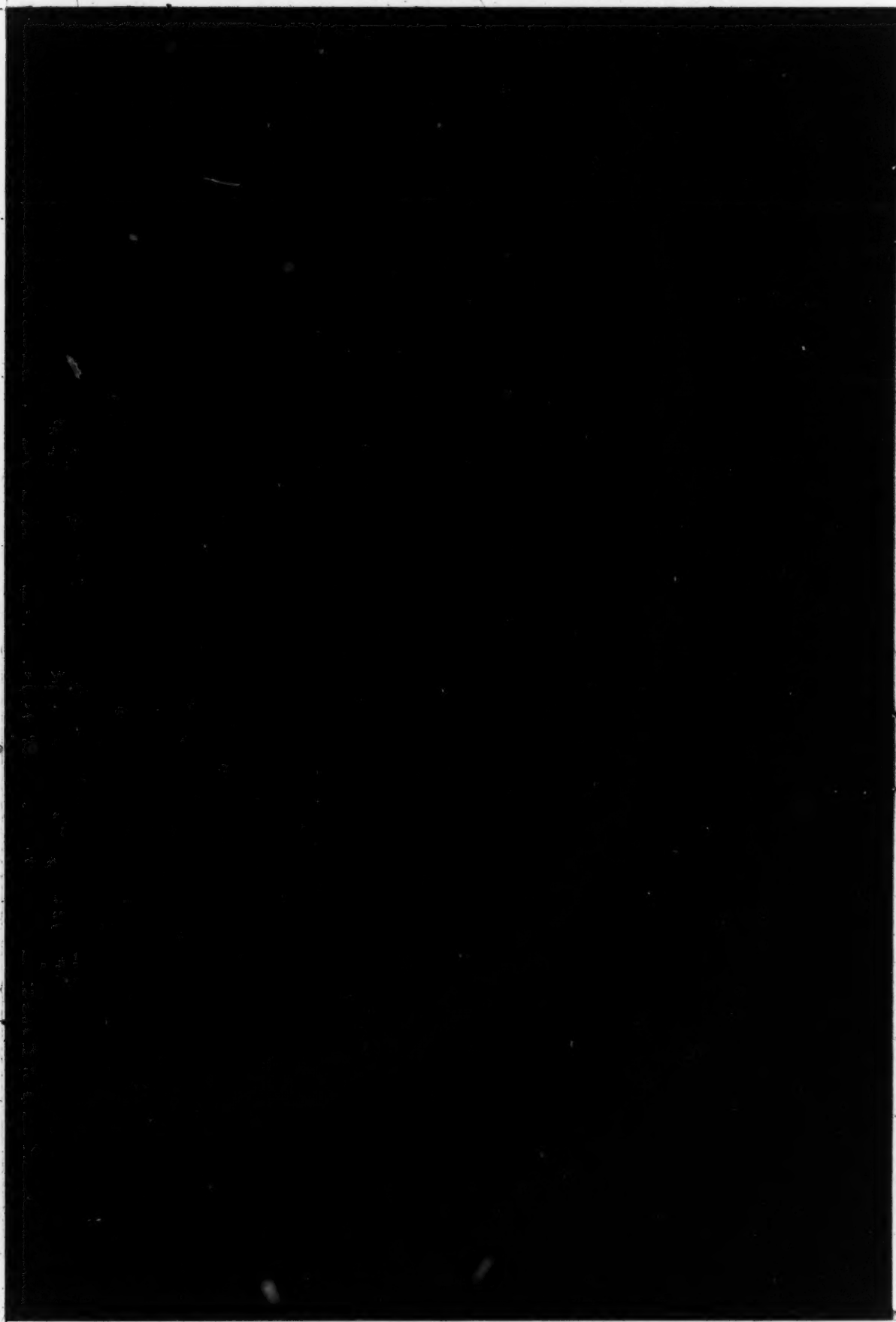

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 790

BRASWELL MOTOR FREIGHT LINES, INC., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment and opinion of a three-judge district court (J.S. App. A) affirming a report and order of the Interstate Commerce Commission (J.S. App. B). The Commission approved, as consistent with the public interest, the purchase by Braswell Motor Freight Lines (Bras-

284-031—67

well)[1] of certain interstate operating rights (authorizing service basically between Oklahoma City, Oklahoma, and all points within 125 miles thereof, on the one hand, and the Chicago, Illinois, and St. Louis, Missouri, commercial zones, on the other) owned by Warren G. Shayler and W. Thurman Shayler, Guardian (Clarinda K. Shayler, Executrix) ("Shayler rights"), pursuant to Section 5(2)(a) of the Interstate Commerce Act, 49 U.S.C. 5(2)(a). The Commission made its approval subject to a restriction against Braswell's joining the rights acquired with any other operating rights it had previously held for the purpose of providing single-line service to or from points in Arizona and California. Appellants are Braswell and the executrix of the Shayler estate, which holds the Shayler rights, and it is only the validity of the Commission restriction on joinder of operating rights which they are challenging.

On February 11, 1963, Braswell filed its application for authority to purchase the Shayler rights. By an order of February 25, 1963, the Finance Board of the Commission granted Braswell's application under Section 210a(b) of the Act, 49 U.S.C. 310a(b), for temporary authority to lease the Shayler rights, and Braswell began such operations on March 18. Subsequently, the Finance Board extended Braswell's temporary authority until final determination of the

[1] Braswell is a motor common carrier of general commodities engaged in interstate commerce over regular routes, as here pertinent, between Dallas, Fort Worth and Houston, Texas, and Oklahoma City and Tulsa, Oklahoma, on the one hand, and El Paso, Texas, Phoenix, Arizona, and Los Angeles, California, on the other.

application for permanent Section 5 authority. After numerous motor carriers and the Class 1 rail carriers in the affected geographical area protested the permanent application, a hearing was held before a Commission examiner in November 1963. On December 29, 1964, the examiner recommended that the proposed purchase by Braswell of the Shayler rights be approved as consistent with the public interest. Thereafter, various protestants filed exceptions, to which applicants replied. In their reply applicants requested that the Commission notice officially the revenues, tonnage, and operating ratios of various protestants for the entirety of the years 1962–1964 (see J.S. App. E, where that data is reproduced).[2]

On December 20, 1965, the Commission, by its Division 3, issued its report and order approving the Braswell purchase of the Shayler rights subject to a joinder restriction against use of the unified rights for providing single-line service to or from points in Arizona and California. In imposing this restriction pursuant to the authority contained in Section 5(2)(b) of the Act, 49 U.S.C. 5(2)(b), the Commission found that during Braswell's unrestricted operation of the unified rights in the six-month period of temporary authority (March–September 1963), it had instituted a substantial volume of motor freight business to and from Arizona and California. It was further found that, due to Braswell's strong financial condition and ability

[2] Data in this regard for part of 1963 and for previous years was in the record before the Commission (see J.S. App. B, 26–27; J.S. App. C, 54–55).

to render single-line service to and from points in Shayler's territory, it could reasonably be expected to increase the quantity of transcontinental traffic from that which it had transported under the temporary authority. This would result, the Commission determined, in a new service by Braswell not theretofore performed by the owners of the Shayler rights, either in conjunction with Braswell or any other motor carrier. Where the institution of such a new service is proposed, the Commission pointed out, a need for the service must be shown by the applicants. Since Braswell had failed to prove that the existing service was inadequate or that there was a public need for such a new service, the Commission concluded that protestants were entitled to protection from the institution of additional competition (J.S. App. B, 26–27). In its report, the Commission declined to notice officially the data tendered by applicants pertaining to operations conducted subsequent to the completion of the hearing (J.S. App. B, 26).

Braswell and Shayler filed a petition for reconsideration and/or further hearing.[3] By an order of July 19,

[3] Attached to this petition was an Appendix A, which ~~protestants~~ applicants stated they would introduce at a further hearing if granted. This appendix purported to be an abstract of representative transcontinental shipments transported by Braswell in 1962 and early 1963 through the Oklahoma City, Tulsa, and Memphis gateways. Also attached to the petition was an Appendix B, a list of data for the various protestants for the years 1962–1964 and the first three quarters of 1965, similar to that for those portions of the years 1962–1964 (J.S. App. E) which the Commission had declined to notice officially. In their petition applicants requested that the Commission grant a further hearing to allow them to introduce such evidence or, in the alternative, notice officially the updated data contained in Appendix B.

1966, Division 3, acting as an Appellate Division, denied this petition. Thereafter, applicants filed a petition seeking a determination that an issue of general transportation importance was involved, which petition was denied by the Commission.

Appellants' action in the district court to set aside the Commission's report and order challenged only the validity of the joinder restriction (J.S. App. A, 3). The court below found that there was substantial evidence to support the Commission's findings that unrestricted approval of the purchase would result in a new transcontinental service for which Braswell had failed to prove a public need and, consequently, affirmed the Commission's approval of the transaction subject to the joinder restriction (J.S. App. A, 6–8). In addition, the court held that the Commission had not abused its discretion in denying applicants' petition for reconsideration and/or further hearing (J.S. App. A, 8–9).[4]

ARGUMENT

The decision below is correct, and this appeal presents no substantial question warranting plenary consideration by this Court.

[4] Although in affirming the Commission's report and order the court dissolved its temporary restraining order of December 2, 1966, which had stayed the orders of the Commission of December 20, 1965, and August 25, 1966, the Commission has not reinstated an effective date for these orders, pending the determination of this appeal. If not enjoined, these orders would have required consummation of the transaction subject to the joinder restriction (and termination of the unrestricted temporary authority) by December 26, 1966.

Appellants' jurisdictional statement raises, in essence, only two questions. Their primary contention is that, in approving the purchase subject to the joinder restriction upon the basis that applicants had failed to prove a public need for the proposed new service, the Commission erroneously applied the "public convenience and necessity" criterion of Section 207 of the Act, 49 U.S.C. 307, instead of the statutory test of "consistent with the public interest" contained in Section 5(2)(b) of the Act, 49 U.S.C. 5(2)(b). Such a contention has been previously raised in a number of similar cases and has been consistently rejected both by this Court and the district courts. *Great Coastal Express, Inc.* v. *United States,* 243 F. Supp. 943 (E.D. Va.), affirmed *per curiam,* 382 U.S. 369; *Ratner* v. *United States,* 162 F. Supp. 518 (S.D. Ill.), affirmed *per curiam,* 356 U.S. 368; *Shein* v. *United States,* 102 F. Supp. 320 (D.N.J.), affirmed *per curiam,* 343 U.S. 944; *Glosson Motor Lines, Inc.* v. *United States,* 271 F. Supp. 467 (M.D. N.C.); *Key* v. *United States,* 263 F. Supp. 544 (S.D. Ind.); *Houff Transfer* v. *United States,* 105 F. Supp. 851 (W.D. Va.). See also *Navajo Freight Lines, Inc.* v. *United States,* 186 F. Supp. 377 (D. Colo.), appeal dismissed, 320 F. 2d 912 (C.A. 10).

Appellants' other basic contention is that the Commission committed reversible error (1) in not giving controlling weight to the revenues, tonnage and operating ratios of protestants during the six months of Braswell's temporary operating authority—data in the record, (2) in refusing in its report to notice officially similar non-record data set out in applicants'

reply to protestants' exceptions (reproduced in J.S. App. E; see *supra*, pp. 3, 4), and (3) in denying their petition for reconsideration and/or further hearing in which they requested that the Commission either grant a further hearing for receipt of the data in Appendix B thereto or notice officially such evidence (see note 3, *supra*). This contention likewise is without merit.

While an administrative agency may take official notice of information not in the record, pursuant to Section 7(d) of the Administrative Procedure Act, 5 U.S.C. 556(e), nothing requires such a body to do so. Cf. *American Trucking Assns.* v. *Frisco Co.*, 358 U.S. 133, 144. Nor is it determinative that the Commission has considered similar data—by taking official notice—in other proceedings or has given controlling significance to such data in the record in certain cases. See *Virginian Ry.* v. *United States*, 272 U.S. 658, 665–666; *Whitehouse Trucking, Inc.* v. *United States*, 261 F. Supp. 9, 11 (N.D. Ohio), affirmed *per curiam*, 388 U.S. 453; *Watkins Motor Lines, Inc.* v. *United States*, 243 F. Supp. 436, 443 n. 11 (D. Neb.); *U.S.A.C. Transport, Inc.* v. *United States*, 235 F. Supp. 689, 693 (D. Del.), affirmed *per curiam*, 380 U.S. 450; *Ace Lines, Inc.* v. *United States*, 197 F. Supp. 591, 599 (S.D. Iowa).[5] In addition, it is well settled that petitions for reconsideration or for further hearing are addressed to the

[5] In any event, as the district court correctly stated, the important question in the case was "not whether the protestants showed that an unrestricted approval of the acquisition by Braswell would have a materially adverse effect on their operations but whether Braswell proved a public need for the new service" (J.S. App. A, 7).

discretion of the administrative agency and that denial of such petitions is not open to question unless in clear abuse of discretionary authority. *United States* v. *Pierce Auto Lines,* 327 U.S. 515, 535; *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503, 514–515; *Glosson Motor Lines, Inc.* v. *United States, supra,* 271 F. Supp. at 473; *Watkins Motor Lines, Inc.* v. *United States, supra,* 243 F. Supp. at 443.[6]

Finally, appellants do not challenge the standard of judicial review which the court below applied (J.S. App. A, 5) in affirming the Commission's decision. See, *e.g., Rochester Tel. Corp.* v. *United States,* 307 U.S. 125, 138–140. Applying the correct standard, that court properly concluded that there was substantial evidence in the record to support the Commission's conclusion that it was consistent with the public interest to subject the proposed purchase by Braswell of the Shayler rights to the joinder restriction preventing use of the unified rights for the providing of a new transcontinental service from and to points in Arizona and California, absent a showing of public need for such service (J.S. App. A, 5–8).

[6] In holding that the Commission had not abused its discretion in denying the petition for reconsideration and/or further hearing (J.S. App. A, 8), the court below specifically referred only to the Commission's refusal to accept the evidence represented by applicants' Appendix A (see note 3, *supra*). However, the court's subsequent statement that "[a]ll points raised by plaintiff not touched upon herein are found to be without merit" (J.S. App. A, 9) shows that the court at least implicitly concluded that the Commission properly exercised its discretion in refusing to notice officially the data contained in Appendix B to the petition for reconsideration.

CONCLUSION

In light of the foregoing discussion, the judgment of the district court should be affirmed.

Respectfully submitted.

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